UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	**Magistrate No. 10-739-11**
	:	
v.	:	
	:	**Trial Date: 8/29/11**
DANIEL CHOI,	:	
Defendant	:	**U.S. Magistrate Judge John M. Facciola**
	:	

GOVERNMENT'S OMNIBUS MOTION IN LIMINE TO LIMIT THE SCOPE OF EVIDENCE AND TESTIMONY REGARDING THE SUBJECT MATTER OF THE PROTEST, PRECLUDE DEFENDANT FROM MAKING A SELECTIVE PROSECUTION CLAIM, AND PRECLUDE THE DEFENSE OF IMPOSSIBILITY

The United States, by and through its attorney, the United States Attorney for the District of Columbia, hereby respectfully moves in limine to (I) limit the scope of evidence and testimony regarding the subject matter of the protest (ii) preclude defendant from raising a selective prosecution claim at trial, and (iii) preclude the defendant from relying on the defense of impossibility. As grounds for this motion, the United States relies on the following points and authorities and such other points and authorities as may be cited at a hearing on this motion.

I. BACKGROUND

On November 15, 2010, the defendant and 12 other individuals were each charged with one count of Failure to Obey a Lawful Order, in violation of Title 36, Code of Federal Regulations (C.F.R.). These charges stemmed from the following incident. At approximately 12:45 p.m., on November 15, 2010, in the area of Lafayette Park and the 1600 block of Pennsylvania Avenue, N.W., Washington, D.C., defendant and 12 other individuals ("the group"), who were dressed in civilian clothes and Army, Navy, and Air Force military uniforms, formed a group on the north side of Lafayette Park. Lafayette Park is located between the 1600

block of H Street, N.W. and Pennsylvania, Avenue, N.W., north of the White House. They walked in pairs side by side through Lafayette Park, crossed Pennsylvania Avenue, and continued to walk onto the White House sidewalk. The group then stepped up onto the masonry base at the bottom of the White House fence and affixed themselves with metal handcuffs to the White House fence, forming a single line across the center of the White House fence. After they all affixed themselves to the White House fence, U.S. Park Police ("U.S.P.P.") officers closed the White House sidewalk with police line tape, securing the center portion of the White House sidewalk.[1]

Then, using a loudspeaker, Lt. LaChance, of the U.S.P.P., gave verbal warnings. He informed the group that they were in violation of regulations applicable to the White House sidewalk and were ordered to leave. Lt. LaChance stated that if they failed to obey the lawful order, the members of the group would be arrested. To ensure that all of the members of the group were in a position to hear the warnings, a U.S.P.P. officer was assigned to the east and west ends of the line the defendants formed. Lt. LaChance, with a loudspeaker, stated the warnings three times successively in three minute intervals. Each officer posted at either end of the group indicated that he could hear the warnings. None of the members of the group who were affixed to the fence attempted to comply with Lt. LaChance's order. U.S.P.P. officers allowed an additional time to elapse to determine if any of the group were going to comply with

[1] The U.S.P.P. officers have the legal authority to maintain law and order and protect persons and property within areas of the National Park System. The White House and its grounds have been part of the National Park System in Washington, D.C., since 1933. The White House sidewalk and any appurtenances, including the White House fence and the masonry base at the bottom of the fence, connected to it constitute the White House grounds.

the order. The group remained affixed to the fence.

During the demonstration, the members of the group chanted. There was one individual from the group who was not affixed to the fence. He had a bull horn and was speaking simultaneously with the others who were demonstrating. They engaged in this conduct to protest the United States military's "Don't Ask, Don't Tell" policy regarding a military service person's sexual orientation. The group chanted phrases such as "I am somebody," "I was court marshaled," "I represent all of those who were court marshaled for being who they are," "Where's the change, Mr. Obama, stand up." Additionally, when prompted by the individual with the bull horn, each member of the group stated his/her name and rank.

After it became apparent that the members of the group had no intention of complying with Lt. LaChance's order, U.S.P.P. officers, equipped with bolt cutters, began to separate each person from the White House fence by cutting each set of handcuffs. As this was done, each member of the group refused to comply with the arrest procedure. They refused to walk from the masonry base to the processing area. As a result, the officers assisted some of the members of the group by preventing them from hitting the ground and injuring themselves. Other officers had to carry some of the members of the group from the masonry base to the processing area. They were arrested for Failure to Obey a Lawful Order. Each member of the group was taken into custody and transported to the U.S.P.P. District 5 Substation where they were positively identified by each respective arresting officer. The members of the group were detained until it was determined that they would be released to return to court for an initial appearance on a later date.

Twelve of the 13 members of the group plead guilty to Failing to Obey a Lawful Order in violation of 36 C.F.R. Section 2.32(a)(2) under the terms of a Deferred Sentencing Agreement. The defendant, Daniel Choi, is the only member of the group proceeding to trial which is scheduled to begin on August, 29, 2011.

On Wednesday, August 24, 2011, at 9:30 p.m., defense counsel Robert Feldman contacted undersigned counsel, Assistant United States Attorney Angela George, and initially, wanted to discuss whether the government would stipulate to the authenticity of photographs that depicted individuals on the White House sidewalk ("WHS") in front of the White House fence, celebrating and supporting President Barack Obama for the death of Osama Bin Laden. When undersigned counsel stated that she would not stipulate to the authenticity of the photos and claimed that they were not relevant to the charged offense, Mr. Feldman, in summary, stated that they were connected to the defendant's claim that he is being selectively prosecuted. There was additional conversation about these subjects and others, and then, the call ended. Additionally, on Thursday, August 25, 2011, this Court held a hearing, at Mr. Feldman's request, to address, according to Mr. Feldman, subjects and/or issues the parties could not agree on. After the case was called and pursuant to the Court's inquiry as to the necessity of the status hearing, defense counsel began to discuss the government's position regarding the authenticity of the photographs and the defendant's request of the prosecutor to make certain law enforcement witnesses available. Defense counsel never affirmatively addressed the issue of selective prosecution. He did not mention selective prosecution until the Court summarized the issue. Prior to that, the government told the Court defense counsel mentioned it in the telephone conversation on August 25th, and the government objected and stated that the issue, according to Fed. R. Crim. P. 12(b),

should be raised and resolved prior to trial. Further, the government also objected to the authenticity of the photographs that were attached to a document that defense counsel delivered directly to chambers. Then, the Court ruled that: (1) the selective prosecution claim would be resolved at the end of the case; (2) it would take judicial notice that the White House is depicted in certain photographs; and (3) any witnesses the defense wanted to secure for trial should be subpoenaed.

Even though no pleading has been filed, it appears that defendant is now claiming that he is being selectively prosecuted in violation of his Constitutional rights.[2] Not only is defendant procedurally barred from raising a selective prosecution claim during trial, even if he had raised the claim in a timely manner, he cannot make a prima facie showing of selective prosecution. Therefore, he should be precluded from raising the claim, and attempting to introduce any evidence related to it during the trial.

II. Arguments

A. Motion in Limine to Limit the Scope of Evidence Regarding the Subject Matter of the Protest.

1. Subject Matter of the Protest May Have Limited Relevance

The fact that the defendant was protesting the United States military's "Don't Ask, Don't Tell" policy regarding a military service person's sexual orientation is only relevant to the extent the Courts needs to determine the lawfulness of the order given by the U.S. Park Police in

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[2] Defendant has provided to the Court, via hand-delivery on August 25, 2011, Court's chambers and without filing, a document entitled "Photographic and Videographic Exhibits from Defendant Pertaining to the Celebration in Front of the White House of the Death of Bin Laden." As of August 28, 2011, no motion, or corresponding points and authorities associated with this document has been filed.

deciding whether the defendant violated 36 C.F.R. Section 2.32(a)(2) (Failure to Obey a Lawful Order). Under Fed. R. Evid. 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401.

To prove Failure to Obey a Lawful Order, the government must prove that the defendant violated the lawful order of a government employee or agent who is authorized to maintain order and control public access and movement during a law enforcement action, or other activities where the control of public movement and activities is necessary to maintain order and public safety. See 36 C.F.R. Section 2.32(a)(2). In determining whether the government's evidence proves the order was lawful, the Court may decide to consider the subject matter of the protest during the offense. The government acknowledges, that the Court may conclude that it is necessary to consider the purpose of the demonstration to determine the lawfulness of the order given by U.S. Park Police on November 15, 2010. In that respect, the purpose of the demonstration would be relevant to whether the defendant failed to obey a lawful order. However, any discussion of the military's "Don't Ask, Don't Tell" policy outside the context of the offense conduct on November 15, 2010 is irrelevant. Thus, the defendant should be precluded from eliciting testimony or introducing evidence in any other form that references, for example, the history of the "Don't Ask, Don't Tell" policy in the U.S. Military or the mistreatment of gay, lesbian, or transgender military service members. Therefore, pursuant to Rule 401 of the Federal Rules of Evidence, defense counsel should not be allowed to elicit testimony or introduce any other evidence regarding "Don't Ask, Don't Tell" in any other context besides the purpose of the defendant's demonstration conduct on November 15, 2010.

B. Motion in Limine to Preclude Evidence of Selective Prosecution

1. Defense Waived Any Selective Prosecution Claim By Failing to Raise it Pre-Trial

Generally, as an initial matter, "[a] selective prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution." U.S. v. Armstrong, 517 U.S. 456, 465 (1996). The D.C. Circuit, in U.S. v. Washington, held that "...the issue of selective prosecution is one to be determined by the court, as it relates to an issue of law entirely independent of the ultimate issue of whether the defendant actually committed the crimes..." U.S. v. Washington, 705 F.2d 489 (D.C. Cir. 1983). Given this issue is a matter of law, it should be decided prior to trial and not considered along with evidence that relates to the merits of the case. The government's argument is based upon well-settled federal law which states the issue of selective prosecution should be resolved prior to trial. See Fed. R. Crim. P 12(b)(3)(A). Further, the process by which a Court considers evidence in support of the claim and makes a final determination on the issue supports the government's contention that the issue should be resolved prior to trial. If the defendant meets the threshold evidentiary requirement to obtain discovery to support the claim, the government must turn over discovery, and then the Court must consider, based upon the evidence in the discovery, whether the prosecution exercised its discretion with a discriminatory purpose, creating a discriminatory effect. If the defendant fails to establish these two elements, the Court should deny the defendant's motion to dismiss.[3] Most

[3]Even if the Court concludes that the discussion of this issue at the status hearing on August 26, 2011 properly puts the issue before the Court, the defendant still has not stated the remedy he is seeking. If he is not seeking a dismissal of the case pursuant to Fed. R. Crim. P. 12, then the Osama Bin Laden photographs should not be introduced as evidence in the trial.

significantly, the defendant will not be allowed to inquire regarding this issue during the trial. Finally, if the Court decides to dismiss the case, the government has a right to appeal that decision prior to trial, Fed. R. Crim. P. 58, and before jeopardy attaches. (i.e., the calling of the first witness in a bench trial).

The defendant has waived any selective prosecution claim because he did not timely raise the issue before the Court. A selective prosecution claim is a legal claim that alleges "a defect in instituting the prosecution" and as such, must be raised prior to trial in accordance with Rule 12 of the Federal Rules of Criminal Procedure or else it is waived. Fed. R. Crim. P. 12(b)(1) and (3); U.S. v. Washington, 705 F.2d 489, 495 (D.C. Cir. 1983)(citing with authority U.S. v. Taylor, 562 F.2d 1345, 1356 (2nd Cir. 1977) (selective prosecution claim waived if not raised prior to trial)). Other than submitting a document, a mere four days before the trial, that contained "Photographic Exhibits Pertaining to the Celebration In Front of the White House f the Death of Bin Laden," defendant has failed to raise a selective prosecution claim. Even considering the discussion during the telephone conference on August 25, 2011, which is the first time defendant hinted at a selective prosecution claim, defendant has failed to articulate a selective prosecution claim and certainly has not complied with the requirements set forth in Rules 12 and 47 of the Federal Rules of Criminal Procedure. Given defendant's failure to raise the claim prior to trial, failure to articulate grounds for such a claim in a way that allows the government to properly respond, and failure to explain the reason for not timely raising the claim, this Court should preclude defendant from raising a selective prosecution claim during trial. See Gary v. United States, 74 F.3d 304, 313 (1st Cir. 1996) (defendant's selective prosecution claim waived because

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irrelevant.

he did not raise it until the morning of trial).

2. Defendant Cannot Make a Prima Facie Case for Selective Prosecution

Even if the Court permits defendant to raise a claim of selective prosecution during trial, defendant cannot make a prima facie case that entitles him to discovery from the government on the issue, let alone prevail on the merits. "In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978). That discretion is not without limit, of course. The government may not base its charging decision on "'an unjustifiable standard such as race, religion, or other arbitrary classification.'" Id. (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962)).

To establish a selective prosecution claim, defendant must show: "that (1) [he] was singled out for prosecution from among others similarly situated and (2) that [his] prosecution was improperly motivated, i.e., based on race, religion or another arbitrary classification." U.S. v. Washington, 705 F.2d 489, 494 (D.C. Cir. 1983) (rejecting selective prosecution claim that defendant was prosecuted because of her religion); U.S. v. Palfrey, 499 F. Supp. 2d 34, 39 (D.D.C. 2007) (rejecting selective prosecution claim); U.S. v. Dixon, 486 F. Supp. 2d 40, 44-45 (D.D.C. 2007) (rejecting selective prosecution claim). The Supreme Court has long held that the standard to make a selective prosecution claim "is a demanding one." U.S. v. Armstrong, 517 U.S. 456, 465 (1996). Even to obtain discovery on a selective prosecution claim, a defendant must make a showing of "some evidence tending to show the existence of the essential elements of the defense, discriminatory effect and discriminatory intent." Id. at 468 (rejecting a selective

prosecution argument that the government singled out black defendants for crack-related prosecutions and denying a defense request to conduct discovery on that issue) (internal quotation marks and citation omitted). In other words, defendant must show both that the decision to prosecute him was motivated by an improper purpose, and that such prosecution had a discriminatory effect on him. See Palfrey, 499 F. Supp. 2d at 34 (rejecting defendant's claim of selective prosecution for lack of any evidentiary support).

Defendant has proffered no evidence at all regarding discriminatory intent. Nor has he made any showing of discriminatory effect: "some evidence that similarly situated defendants of other [subject matter protests and sexual orientations] could have been prosecuted, but were not." Armstrong, 517 U.S. at 469. Defendant has not even alleged – much less provided "some evidence" – that others similarly situated to him were not prosecuted for misdemeanor Failure to Obey a Lawful Order 36 C.F.R. Section 2.32(a)(2). The only thing that defendant has submitted to the Court is his document of "Photographic Exhibits Pertaining to the Celebration In Front of the White House of the Death of Bin Laden." Defendant maintains that these photographs depict people at the White House fence celebrating the killing of Osama Bin Laden, and demonstrating that they support President Obama. Defendant claims that they were not arrested by the U.S.P.P. because they supported President Obama's Administration. In contrast, defendant claims that he was arrested because he protested against the military's "Don't Ask, Don't Tell" policy, and because of his sexual orientation, which he characterizes as an anti-Obama perspective. Beyond such veiled and baseless assertions, defendant has not presented any evidence, and cannot present any evidence, to support his claims.

Defendant and the other 12 members of the group were ordered three separate times to

leave the WHS, and they refused to do so. The order was reasonable, not speech-content based, and not arbitrary and capricious. Under U.S. v. Goldin, 311 F.3d 191 (3d Cir. 2002) and U.S. v. Poocha, 259 F.3d 1077 (9th Cir. 2001), park police and/or park rangers have authority to issue reasonable orders that are not based on content of speech, and are not arbitrary and capricious, "where control of public movement and activities is necessary to maintain order and public safety." 36 C.F.R. 2.32(a)(2). In Goldin, the protesters were not violating a regulation when they were ordered to disperse, and the Third Circuit upheld the order as lawful because it was reasonable under the circumstances and was not based on the content of the protesters' speech. See Goldin, 311 F.3d 191. In Poocha, the Ninth Circuit upheld a conviction for failing to follow a lawful order based on a park ranger's ordering bystanders to an arrest to leave the area because the bystanders were cursing the officers but not violating any federal regulation. See Poocha, 259 F.3d 1077.

Further, if the Court determines that the government must establish that the defendant's conduct was unlawful as a predicate to concluding the order was lawful, the government can prove the defendant's conduct was unlawful. In addition to the facts proffered in this motion, the government will present evidence that will establish the defendant engaged in unlawful conduct pursuant to 36 C.F.R. Section 7.96 (Demonstrating without a Permit) and/or 36 C.F.R. 2.34 (Disorderly Conduct).

In this case, the U.S.P.P. had the authority to order him and the other members of the group to un-handcuff themselves and to leave the area when they chained themselves to the WHF, blocking the view of the public and security officers into the White House grounds, and perhaps concealing hazardous materials or explosives. Defendant cannot show that his arrest and

subsequent prosecution was motivated by any discriminatory purpose or that it had any discriminatory effect. Therefore, the Court should preclude the defendant from raising a selective prosecution claim at trial.

C. Motion in Limine to Preclude Defense of Impossibility

The defendant intends to present the defense of impossibility. As the government understands this defense, the defendant claims that because he was handcuffed to the WHF and was without benefit of a key that would have unlocked his handcuffs, it was therefore impossible for him to comply with the repeated orders given by U.S.P.P. officers to disperse.[4] The defendant's claim is without merit, and this Court should preclude the defense from being advanced at trial.

In the arena of contempt litigation, while well-settled that impossibility of performance is a valid defense to a motion for contempt, see United States v. Rylander, 460 U.S. 752, 757 (1983), and that a defendant cannot be held in contempt for failure to obey a sanctions order if he lacks financial ability to comply with that order, see Tinsley v. Mitchell, 804 F.2d 1254, 1256 (D.C. Cir.1986) (per curiam); O'Leary v. Moyer's Landfill, Inc., 536 F.Supp. 218, 219 (E.D.Pa.1982), it is also equally well-settled that the burden of production and proof rests on a defendant advancing this defense, see Rylander, 460 U.S. at 757; O'Leary, 536 F.Supp. at 219. A defendant advancing the defense of impossibility "must show 'categorically and in detail' why he

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[4]Once again, instead of filing a pre-trial motion as Fed. R. Crim. P. 12(b)(2) requires, the defendant raises this legal issue in a non-legal forum, the media. Norm Kent, defendant's co-counsel of record, according to an article in The Miami Herald, stated "One of the defenses I intend to invoke is impossibility." According to the electronic court docket, PACER, the defendant has yet to file a motion alleging this defense, and he has not provided any oral notification to the Court.

is unable to comply." O'Leary, 536 F.Supp. at 219 (quoting N.L.R.B. v. Trans-Ocean Export Packing, Inc., 473 F.2d 612, 616 (9th Cir.1973)). In addition, unless a defendant is completely unable to comply with the Court's Order's due to poverty, he must comply to the extent that his finances allow him. See S.E.C. v. Musella, 818 F.Supp. 600, 602 (S.D.N.Y.1993).

Moreover, "where the person charged with contempt is responsible for the inability to comply, impossibility is not a defense to the contempt proceedings." Pesaplastic, C.A. v. Cincinnati Milacron Co., 799 F.2d 1510, 1512 (11th Cir.1986). See also, In re Lawrence, 238 B.R. 498, 500 (S.D. Fla. 2000) (where a defendant self-creates the impossibility, the defense of impossibility is invalid).

In this case, the evidence will show that the defendant and his fellow protestors handcuffed themselves to the WHF. While handcuffed to the fence, the protestors were told on three occasions to disperse or face arrest. These instructions were given using loudspeaker over a duration of approximately 9 minutes. During that time, the defendant never (I) asked to be released, (ii) informed the police that he did not have a key to his handcuff, (iii) indicated that he would disperse upon being un-handcuffed, nor (iv) stated or made any gesture indicating the same. Rather, the defendant continued to chant his protest and, as depicted on at least one publicly aired video, led his fellow chanting protestors. On these facts, the Court should preclude the defendant from raising the defense of impossibility. First, the defendant cannot meet his burden. His arrest was intentional, not a mistake, nor did the defendant intend at any moment to avoid arrest. Second, the evidence will further show that the defendant created his circumstance, i.e. handcuffing himself to the fence, and therefore, he cannot benefit from his self-created circumstance.

WHEREFORE, the government respectfully requests that this Court grant its motions to (I) limit the scope of evidence and testimony regarding the subject matter of the defendant's protest, (ii) preclude the defendant from raising a selective prosecution claim, and (iii) preclude the defense of impossibility.

Respectfully submitted,

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